



U.S. Department  
of Transportation


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Washington, D.C.  
20590

Office of the General Counsel

June 19, 2017

**MEMORANDUM TO THE WHITE HOUSE COUNSEL**

From:

  
Judith S. Kaleta  
Acting General Counsel  
Designated Agency Ethics Official

Re:

Request for Waiver of Executive Order 13770  
for Senior Advisor Derek T. Kan, U.S. Department of Transportation

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**ACTION REQUESTED**

I request that you grant a waiver of Section 1, paragraph 6 of Executive Order 13770 (Jan. 28, 2017) (the "Executive Order") to Derek T. Kan, Senior Advisor at the U.S. Department of Transportation ("DOT") for particular matters involving the National Railroad Passenger Corporation ("Amtrak").

**BACKGROUND**

The Executive Order requires Presidential appointees to sign an Ethics Pledge that, among other things, prohibits them from working on particular matters involving specific parties that are directly and substantially related to a former employer or client for a period of two years. Section 3 of the Executive Order permits the President or his designee to grant a waiver of any restrictions contained in that Pledge.

Amtrak is the country's passenger railroad transportation service. It was created by Congress in 1971 to take over most U.S. passenger rail services, and its organization and operations are governed by the requirements of 49 U.S.C. §§ 24301 *et seq.* One of those requirements addresses the composition of Amtrak's Board of Directors; it provides that Amtrak's Board is composed of the Secretary of Transportation, Amtrak's President (who serves as a nonvoting member), and "8 individuals appointed by the President, by and with the advice and consent of the Senate, with general business and financial experience, experience or qualifications in transportation, freight and passenger rail transportation, travel, hospitality, cruise line, or passenger air transportation businesses, or representatives of employees or users of passenger rail transportation or a State government." 49 U.S.C. § 24302(a)(1)(C). The Deputy Secretary of Transportation is the Secretary's designee on Amtrak's Board under 49 C.F.R. § 1.23(g).

Recently, the Secretary designated the Federal Railroad Administrator (FRA) Executive Director as the Secretary's designee to the Amtrak Board. The FRA Administrator was the Secretary's designee on the Amtrak Board from 2015 to January 20, 2017.

The Executive Order's definition of "former employer" in Section 2(j) states that it "does not include any executive agency or other entity of the Federal Government, State or local government, the District of Columbia, Native American tribe, or any United States territory or possession." Here, Amtrak has been deemed a governmental entity in nearly all respects, and it is therefore questionable whether a waiver is needed. Indeed, the Supreme Court concluded that Amtrak is a governmental entity in *U.S. Department of Transportation v. Association of American Railroads*, 135 S.Ct. 1225 (2015). In that case, the Court evaluated whether Amtrak is a governmental entity for purposes of establishing metrics and standards; its analysis is relevant here in evaluating whether Amtrak is covered by the Executive Order. The Court stated:

It is appropriate to begin the analysis with Amtrak's ownership and corporate structure. The Secretary of Transportation holds all of Amtrak's preferred stock and most of its common stock. Amtrak's Board of Directors is composed of nine members, one of whom is the Secretary of Transportation. Seven other Board members are appointed by the President and confirmed by the Senate. 49 U.S.C. § 24302(a)(1). These eight Board members, in turn, select Amtrak's president. § 24302(a)(1)(B); § 24303(a). Amtrak's Board members are subject to salary limits set by Congress, § 24303(b); and the Executive Branch has concluded that all appointed Board members are removable by the President without cause, *see* 27 Op. Atty. Gen. 163 (2003).

Under further statutory provisions, Amtrak's Board members must possess certain qualifications. Congress has directed that the President make appointments based on an individual's prior experience in the transportation industry, § 24302(a)(1)(C), and has provided that not more than five of the seven appointed Board members be from the same political party, § 24302(a)(3). In selecting Amtrak's Board members, moreover, the President must consult with leaders of both parties in both Houses of Congress in order to "provide adequate and balanced representation of the major geographic regions of the United States served by Amtrak." § 24302(a)(2).

In addition to controlling Amtrak's stock and Board of Directors the political branches exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations. Amtrak must submit numerous annual reports to Congress and the President, detailing such information as route-specific ridership and on-time performance. § 24315. The Freedom of Information Act applies to Amtrak in any year in which it receives a federal subsidy, 5 U.S.C. § 552, which thus far has been every year of its existence. Pursuant to its status under the Inspector General Act of 1978 as a " 'designated Federal entity,' " 5 U.S.C. App. § 8G(a)(2), p. 521, Amtrak must maintain an inspector general, much like governmental agencies such as the Federal Communications Commission and the Securities and Exchange Commission. Furthermore, Congress conducts frequent

oversight hearings into Amtrak's budget, routes, and prices. *See, e.g.*, Hearing on Reviewing Alternatives to Amtrak's Annual Losses in Food and Beverage Service before the Subcommittee on Government Operations of the House Committee on Oversight and Government Reform, 113th Cong., 1st Sess., 5 (2013) (statement of Thomas J. Hall, chief of customer service, Amtrak); Hearing on Amtrak's Fiscal Year 2014 Budget: The Starting Point for Reauthorization before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the House Committee on Transportation and Infrastructure, 113th Cong., 1st Sess., p. 6 (2013) (statement of Joseph H. Boardman, president and chief executive officer, Amtrak).

It is significant that, rather than advancing its own private economic interests, Amtrak is required to pursue numerous, additional goals defined by statute. To take a few examples: Amtrak must "provide efficient and effective intercity passenger rail mobility," 49 U.S.C. § 24101(b); "minimize Government subsidies," § 24101(d); provide reduced fares to the disabled and elderly, § 24307(a); and ensure mobility in times of national disaster, § 24101(c)(9).

In addition to directing Amtrak to serve these broad public objectives, Congress has mandated certain aspects of Amtrak's day-to-day operations. Amtrak must maintain a route between Louisiana and Florida. § 24101(c)(6). When making improvements to the Northeast corridor, Amtrak must apply seven considerations in a specified order of priority. § 24902(b). And when Amtrak purchases materials worth more than \$1 million, these materials must be mined or produced in the United States, or manufactured substantially from components that are mined, produced, or manufactured in the United States, unless the Secretary of Transportation grants an exemption. § 24305(f).

Finally, Amtrak is also dependent on federal financial support. In its first 43 years of operation, Amtrak has received more than \$41 billion in federal subsidies. In recent years these subsidies have exceeded \$1 billion annually. *See* Brief for Petitioners 5, and n. 2, 46.

Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise. Among other important considerations, its priorities, operations, and decisions are extensively supervised and substantially funded by the political branches. A majority of its Board is appointed by the President and confirmed by the Senate and is understood by the Executive to be removable by the President at will. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions. And that exercise of governmental power must be consistent with the design and requirements of the Constitution, including those provisions relating to the separation of powers.

135 S.Ct. at 1232-33.

Mr. Kan was appointed by the President to Amtrak's Board in 2015. In serving as one of the eight Presidentially-appointed Directors, he developed invaluable knowledge and expertise of Amtrak matters from the Federal perspective. No other current DOT employee has as much recent experience serving on Amtrak's Board.<sup>1</sup> Mr. Kan holds no financial interest in Amtrak.

The President announced his intent to nominate Mr. Kan to be DOT's Under Secretary of Transportation for Policy on April 6, 2017, and nominated him for that position on May 16, 2017. On June 5, 2017, the President appointed him as a Senior Advisor at DOT. Upon his appointment as Senior Advisor, Mr. Kan resigned from Amtrak's Board. In addition, the terms of Mr. Kan's Ethics Agreement require him to resign from Amtrak's Board if confirmed as Under Secretary of Transportation for Policy. Throughout his nomination process and also upon his entry on duty as Senior Advisor, he was advised of his recusal obligations under the Executive Order and U.S. Office of Government Ethics Standards of Conduct for Executive Branch Employees, 5 C.F.R. § 2635.502. He has complied with the restrictions on participating in particular matters involving specific parties, including matters involving Amtrak.

In his role as Senior Advisor, Mr. Kan is a key advisor to the Secretary of Transportation on transportation policy issues and high-profile matters, which would normally include the Secretary's participation on Amtrak's Board. He will continue in this role if confirmed as Under Secretary of Transportation for Policy. As described above, DOT has significant involvement with Amtrak; DOT holds almost all of Amtrak's stock, it works closely with Amtrak on many issues including metrics and standards, and it provides funding for Amtrak. In addition, many of its rail-related actions through DOT's Federal Railroad Administration affect and/or involve Amtrak. Without a waiver, Mr. Kan is unable to provide DOT and the Administration with the benefit of his expertise and recent experience on particular matters involving Amtrak.

## ANALYSIS

As an initial matter, we question whether a waiver is necessary given that Amtrak appears to qualify as a governmental entity under the definition of "former employer" in the Executive Order. The Executive Order provides that governmental entities are excluded from the definition of "former employer" and no waiver is required for appointees to participate in particular matters involving specific parties that include governmental entities. Here, we believe that Amtrak qualifies as a governmental entity and a waiver is not needed. However, out of an abundance of caution we are requesting this waiver to avoid any question about whether Mr. Kan may participate in Amtrak matters while at DOT.

If Amtrak is considered a former employer of Mr. Kan's under the Executive Order, he cannot participate in particular matters involving Amtrak for two years from his appointment. A waiver

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<sup>1</sup> The Deputy Secretary of Transportation served on Amtrak's Board from 2003 to 2006 when he held the position of General Counsel at DOT. However, the Deputy Secretary has no recent experience on Amtrak's Board, and no other DOT employee has as much experience on Amtrak's Board.

of the Pledge to allow Mr. Kan to participate in matters involving Amtrak is warranted for the reasons discussed below.

First, Mr. Kan would bring unique expertise and experience to Amtrak matters that no other DOT employee can provide. As an Amtrak Board member from 2015 to 2017, Mr. Kan developed invaluable experience and expertise in assessing Amtrak matters from the Federal perspective. There is no DOT employee with as much recent experience on Amtrak's Board. The Deputy Secretary of Transportation served on Amtrak's Board from 2003 to 2006, when he held the position of General Counsel at DOT, but he has no recent experience on Amtrak matters. As a result, unless a waiver is granted here the Secretary of Transportation and other government officials will be deprived of the benefit of a uniquely experienced appointee who has developed recent expertise in serving the Federal interest while serving on Amtrak's Board.

Utilizing Mr. Kan's recent experience on Amtrak's Board would be particularly beneficial for DOT and the Administration because currently there are several significant matters involving Amtrak. For example, the Gateway Program Development Corporation was created in late 2016 to oversee and deliver the Gateway Program, a comprehensive rail expansion and improvement program on the busiest section of railroad in North America to preserve existing Northeast Corridor rail service and bring the infrastructure into a state of good repair. Amtrak is a key partner in the project and Amtrak's Board Chairman is the Vice-Chair of the Corporation's Board of Trustees. DOT also is a partner in the project and serves on the Board of Trustees. Mr. Kan has been involved in the project and Corporation over the past two years through his service on Amtrak's Board, and DOT and the Administration should be able to benefit from Mr. Kan's continued participation on this project.

These matters involve deliberations and decisionmaking that occurred over the past few years, so Mr. Kan's recent experience on Amtrak's Board is especially relevant and helpful. No other DOT employee has the knowledge of Amtrak's recent activities that Mr. Kan has. As Amtrak's Board Chairman Tony Coscia stated last week, "[s]ignificant advances have been made in an effort to make Amtrak more accountable to its stakeholders and Derek has been at the forefront of this effort."

It would be inefficient to require the Deputy Secretary of Transportation or any other DOT appointee to spend substantial time and effort getting up to speed on current Amtrak matters when Mr. Kan already has this knowledge and is willing to participate in Amtrak matters on DOT and the Administration's behalf. Further, no other DOT employee would have the same knowledge of Amtrak's 2015-17 activities that Mr. Kan has. With a waiver, DOT and the Administration could hit the ground running on Amtrak issues. We should be allowed to benefit from Mr. Kan's recent experience as an Amtrak Board member.

Second, Mr. Kan would continue to serve the same Federal interest as he previously did on Amtrak's Board if he were granted a waiver. Indeed, the Federal interest is the same from Mr. Kan's prior service on Amtrak's Board to his contemplated service as the Secretary's designee on the Board. In both cases, he did and would serve to ensure that the Board's actions are consistent with the President's agenda and Administration priorities. There is no difference between Mr. Kan's interest in serving as a Presidential appointee on Amtrak's Board and serving

as a Secretarial designee on the Board. Given the nature of his previous role on Amtrak's Board in serving the Federal interest, a reasonable person with knowledge of the facts would not question his impartiality if he were to participate in Amtrak matters while serving as a DOT employee.

Finally, permitting Mr. Kan to participate in Amtrak matters would only inure to the benefit of DOT and the Administration. As noted above Mr. Kan holds no financial interest in Amtrak, so there would be no benefit to him personally if he were permitted to participate in Amtrak matters. Granting this waiver would only benefit the President and Administration by ensuring that an appointee with expertise and experience can continue to advise the President and other government officials on Amtrak matters.

### **CONCLUSION**


For the reasons stated above, I request that you grant Mr. Kan a waiver of the restriction in Section 1, paragraph 6 of the Executive Order, so that he may participate in particular matters involving specific parties that are directly and substantially related to Amtrak, including regulations and contracts.

**Office of White House Counsel Waiver Certification**

Pursuant to Executive Order 13770, Section 3, and as the President's designee authorized to grant such waiver, it is in the public interest to grant a waiver of Section 1, paragraph 6 of the Executive Order to Derek T. Kan, Senior Advisor, United States Department of Transportation ("DOT") as pertains to Amtrak. I have determined that this waiver is required to enable him to effectively carry out his duties as Senior Advisor at DOT. Absent this waiver, Mr. Kan would be restricted for two years, beginning with his appointment date, from participating in any particular matter involving specific parties in which his former employer, Amtrak, is directly and substantially affected. Mr. Kan's role as Senior Advisor and, if confirmed, as Under Secretary of Transportation for Policy, is at the center of DOT's important transportation safety and related missions. The successful accomplishment of these DOT missions relies on extensive, open, and collaborative communications within DOT and between the Senior Advisor and the President, United States government officials, and Amtrak. In authorizing this waiver, I have considered the nature of Mr. Kan's involvement with Amtrak while he was a Presidential appointee to Amtrak's Board of Directors, and the national interest served by authorizing Mr. Kan to freely participate on matters affecting Amtrak while serving as a Federal employee. This waiver will significantly promote and protect the public interest by enabling Mr. Kan to freely carry out the responsibilities of his office.

This waiver does not otherwise affect Mr. Kan's obligation to comply with all other pre-existing government ethics rules, other provisions of the Executive Order and with the other commitments he made in his Ethics Agreement pursuant to his nomination for Under Secretary of Transportation for Policy.

29 June 2017  
Date

  
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Donald F. McGahn II  
Counsel to the President